petition and the brief in support thereof and of the entire transcript of the record of the case.

Dated the 14th day of July, 1922.

ROBERT O. HARRIS
United States Attorney for the District of Massachusetts, Attorney for Respondents,
By FREDERIC S. HARVEY,
Assistant United States Attorney.

# In the Supreme Court of the United States

OCTOBER TERM, 1922.

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| SIMON HECHT AND SUMMIT L. HECHT, trustees, v. JOHN F. MALLEY, FORMER COLLECTOR of Internal Revenue. | No. 532. |
| ARTHUR L. HOWARD AND ROBERT S. Barlow, trustees, v. JOHN F. MALLEY, FORMER COLLECTOR of Internal Revenue. | No. 533. |
| ARTHUR L. HOWARD AND ROBERT S. Barlow, trustees, v. ANDREW J. CASEY, FORMER ACTING Collector of Internal Revenue. | No. 534. |

*PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.*

**BRIEF FOR THE RESPONDENT IN OPPOSITION.**

The above cases arise under the Federal Income Tax Acts of 1916 and 1918. Petitioners claim they are trustees under a declaration of trust and as such

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are not subject to the tax imposed by the Revenue Acts of 1916 and 1918 on "every corporation, joint-stock company, or association, now or hereafter organized in the United States for profit and having a capital stock represented by shares, * * *"

These are class cases and involve the determination of the taxable status of so-called "Massachusetts Trusts," which are a form of organization whereby trustees under a declaration of trust hold legal title to property, manage it for the benefit of those persons who shall from time to time own the certificates of beneficial interests therein, and pay the net income derived therefrom to the shareholders.

Section 407 of the act of September 8, 1916, c. 463, 39 Stat. 756, 789, provides:

> That on and after January first, nineteen hundred and seventeen, special taxes shall be, and hereby are, imposed annually, as follows, that is to say:
>
> Every corporation, joint-stock company or association, now or hereafter organized in the United States for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States, or any State or Territory of the United States, shall pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint-stock company or association, or insurance company, equivalent to 50 cents for each $1,000 of the fair value of its capital stock and in estimating the value of

> capital stock the surplus and undivided profits shall be included: * * *

Section 1000 of the act of February 24, 1919, c. 18, 40 Stat. 1057, 1126, provides:

> That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the Revenue Act of 1916—
>
> (1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included; * * *

Section 1 of said act defines corporations as follows:

> The term "corporation" includes associations, joint-stock companies, and insurance companies; * * *

The United States District Court for the District of Massachusetts held that the capital stock tax provisions of the acts of 1916 and 1918 were in substance a continuation of the corporate excise tax levied by the revenue act of 1909 and, relying on the construction of the act of 1909 in *Eliott* v. *Freeman*, 220 U. S. 179, held that the tax provisions of the acts of 1916 and 1918, *supra*, applied only to associations which derived their powers from some statute. (*Hecht et al.* v. *Malley*, 276 Fed., 830.)

The several trust cases were consolidated and the Circuit Court of Appeals for the First Circuit reversed the decision of the District Court. (*Malley* v. *Howard et al.*, 281 Fed. 363.)

The Circuit Court of Appeals in its decision above cited draws a distinction between the provisions of the acts of 1916 and 1918 and the provision found in the act of 1909, in the following language (p. 365–366):

> The history of the legislation lends emphasis to the initial impression of its import. For it is elementary that, when language used in an earlier statute has in application received judicial construction, change in language in later analogous legislation imports legislative purpose to attain a different result. If Congress had intended the acts in question to have the restricted application given by the Supreme Court to the act of 1909, there was no conceivable reason for changing the words "organized under the laws of the United States or of any State," etc., to "organized in the United States."
>
> We think it plain that by this change Congress intended in the later acts to include non-statutory organizations, and to avoid the restriction found by the Supreme Court in the words of the 1909 act. We can not accord with the learned district judge in his view that "it is hard to discover any substantial distinction between the scope of "the act of 1909 and the acts of 1916 and 1918 "as far as 'associations' are concerned." We think there is a vital and controlling distinction.

The Circuit Court of Appeals held the petitioners to be associations within the meaning of the revenue acts and subject to the taxes imposed by the acts of 1916 and 1918. After reviewing the organization of the trusts herein referred to, the court said (pp. 368, 369):

> Plainly the Hecht Trust is quasi corporate in form and power. It is an association within the meaning of the revenue acts.
>
> The Haymarket Trust, both in genesis and organization, is even more like a corporation. It has none of the aspects of a family affair. It started by securing from the investing public $250,000 on solicited subscriptions, the trustee paying a commission of $2,500 to the promoter for thus raising the capital for doing business. The declaration of trust provides for nearly all the machinery and proceedings of an ordinary corporation. We hold it also to be quasi corporate and an association within the meaning of the revenue acts.

Referring to the status of these trusts under the statutes of Massachusetts the court said (pp. 370, 371):

> But the proposition that they are quasi corporate in form need not rest merely on our own analysis or on observations found in the decisions of the Massachusetts courts. It has now been distinctly recognized by the Massachusetts Legislature; they have a statutory status as associations, not as trusts or as partnerships.

In the decision below, these organizations have been treated as having no status not arising out of the common law; so also in the briefs of the Government and of counsel for the defendant. It seems to have been overlooked that they have acquired in Massachusetts a distinct statutory basis. This, if the question before us were otherwise doubtful, would seem to us of much significance. See Gen. Laws Mass. 1921, c. 182, codifying earlier legislation of 1909, 1913, 1914, 1915, and 1916. Compare, also, St. 1921, c. 368. The title of this chapter is "Voluntary Associations."

In section 1 of this act, dealing with definitions, it is provided:

"'Association,' a voluntary association under a written instrument or declaration of trust, the beneficial interest under which is divided into transferable certificates of participation or shares."

This definition exactly fits the plaintiffs at bar.

It is readily apparent that the petitioning trust associations have many of the characteristics of a corporation and are in fact associations "organized in the United States for profit and having a capital stock represented by shares" and are, therefore, subject to the taxing provisions of the revenue acts of 1916 and 1918, hereinbefore referred to.

The only grounds advanced by the petitioners for the issuance of a writ of certiorari are:

(1) The importance of the questions involved;

(2) That the decision of the Circuit Court of Appeals is in conflict with the decision of this court in *Eliott* v. *Freeman, supra.*

1. The question involved here is whether these and other similar trusts are subject to the taxing provisions of the acts of 1916 and 1918. The solution of this question is important only to trust associations similar in character to petitioners which are seldom, if ever, found outside of the State of Massachusetts. They are organized for the purpose of securing the benefits without assuming the responsibilities of corporations.

2. The change in the language of the acts of 1916 and 1918 was undoubtedly made, as stated by the Circuit Court of Appeals, to avoid the restriction in the act of 1909, pointed out by the Supreme Court in *Eliott* v. *Freeman, supra.* That being true, there exists no conflict between the decision of the Circuit Court of Appeals for the First Circuit in *Malley* v. *Howard et al.*, 281 Fed. 363, and the decision of this court in *Eliott* v. *Freeman, supra.* The alleged grounds for the issuance of the certiorari are, therefore, without merit.

It is submitted that the petition should be denied.

JAMES M. BECK,
*Solicitor General.*
ALBERT OTTINGER,
*Assistant Attorney General.*
HARVEY B. COX,
*Attorney.*

OCTOBER, 1922.

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No. 99
No. 100
No. 101

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# Supreme Court of the United States.

October Term, 1922.

SIMON HECHT AND SUMMIT L. HECHT, TRUSTEES,
v.
JOHN F. MALLEY, FORMER COLLECTOR OF INTERNAL REVENUE.

ARTHUR L. HOWARD AND ROBERT S. BARLOW, TRUSTEES,
v.
JOHN F. MALLEY, FORMER COLLECTOR OF INTERNAL REVENUE.

ARTHUR L. HOWARD AND ROBERT S. BARLOW, TRUSTEES,
v.
ANDREW J. CASEY, FORMER ACTING COLLECTOR OF INTERNAL REVENUE.

## Brief in Support of Petition for Writ of Certiorari.

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EDWARD F. McCLENNEN,
ALLISON L. NEWTON,
Attorneys for the Petitioners.

July, 1922.

## TABLE OF STATUTES.



## TABLE OF CASES.

# Supreme Court of the United States.

OCTOBER TERM, 1922.

SIMON HECHT AND SUMMIT L. HECHT, TRUSTEES,

*v.*

JOHN F. MALLEY, FORMER COLLECTOR OF INTERNAL REVENUE.

ARTHUR L. HOWARD AND ROBERT S. BARLOW, TRUSTEES,

*v.*

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ARTHUR L. HOWARD AND ROBERT S. BARLOW, TRUSTEES,

*v.*

ANDREW J. CASEY, FORMER ACTING COLLECTOR OF INTERNAL REVENUE.

## Brief in Support of Petition for Writ of Certiorari.

### Grounds for the Writ.

In one opinion in these three cases the Circuit Court of Appeals for the First Circuit, reversing the decision

of the District Court for the District of Massachusetts in suits brought for refunds, has held liable to the capital-stock excise the trustees of a Massachusetts real-estate trust existing by voluntary agreement at common law, on the ground that the trust is an "association" in the sense in which that term is used in conjunction with "corporations" and "joint stock companies" in the acts of 1916 and 1918 imposing this tax. This decision is directly opposed to the decision of this Supreme Court in *Eliot* v. *Freeman*, 220 U.S. 178, which held that such a trust can hardly be said to be *"organized"* and certainly is not organized *"under law"* and enjoys no *"privilege."* The Court of Appeals reached this decision because it was of opinion that the law had been changed by the acts of 1916 and 1918, not in force when *Eliot* v. *Freeman* was decided. The slight changes made in the language of the acts—it is respectfully submitted—are entirely inadequate to indicate an intention on the part of the Congress to bring under this special-privilege tax men who enjoy no privilege. The District Court so held.

(The opinion of the Circuit Court of Appeals covers also the case of *Malley* v. *Crocker*, involving some different questions and in which separate counsel argued.)

The question presented is of great public importance. Although not appearing in the record, it is so commonly known as to warrant judicial notice, a great many of these trust deeds have been drawn and acted under since the decision in *Eliot* v. *Freeman*. The amount of taxes involved is large. All nine circuits are affected. These cases were brought as test cases. It is highly important to have a decision by the

Supreme Court, again to set at rest the doubts which were dissipated by the decision in *Eliot* v. *Freeman*.

The capital-stock taxes involved are those assessed for periods ending June 30, 1917, 1918, 1919 and 1920, under the laws of 1916 and 1918, respectively. The facts are set out succinctly in the petition for certiorari. The declarations of trust under which these trustees act, and the methods by which the terms of the trust are carried out, are set out in the opinion of Judge Morton (Record, p. 27; p. 107) and in the statement of facts found by him (Record, pp. 10, 34; pp. 76, 95).

The petitioners submit that they are trustees, and not associations, and that they are not created or organized by law, and that they have their powers and rights and incur their duties and obligations by voluntary agreement only, without the assistance of special powers provided by law, and that neither the act of 1918 nor the act of 1916 imposed a capital-stock tax on such trustees.

These trustees hold Massachusetts real estate. The trust indentures were executed in Massachusetts by Massachusetts parties. No special rights are given them by the laws of the United States or of Massachusetts. Under the laws of Massachusetts they are either partnerships or trusts, and not associations. The Massachusetts Courts have held such trusts to be partnerships if a sufficient degree of control is in the shareholders, and trusts if the control is in the trustees.

*Williams* v. *Milton*, 215 Mass. 1.
*Horgan* v. *Morgan*, 233 Mass. 381.
*Dana* v. *Treasurer*, 227 Mass. 563, 565.

*Frost* v. *Thompson*, 219 Mass. 360.
*Taber* v. *Breck*, 192 Mass. 355.
*Williams* v. *Boston*, 208 Mass. 497.
*Hoadley* v. *County Commissioners*, 105 Mass. 519.
*Gleason* v. *McKay*, 134 Mass. 419.
*Phillips* v. *Blatchford*, 137 Mass. 510.
*Ricker* v. *American Loan & Trust Co.*, 140 Mass. 346.
*Edwards* v. *Warren Linoline Works*, 168 Mass. 566.
*Hussey* v. *Arnold*, 185 Mass. 202.
*Peabody* v. *Treasurer and Receiver General*, 215 Mass. 129.

It is immaterial in the present case whether the indentures create a trust only or a partnership, because neither trusts nor partnerships are subject to the capital-stock tax, but only corporations, joint-stock companies and associations. It is obvious that the petitioners are not corporations or joint-stock companies. That they are not associations, and that they are not organized or created by law, as these terms are used in the acts imposing the capital-stock excise, is shown by the text of the acts, by their manifest purpose and by the history of the legislation on this subject. The excise tax, under title X, section 1000, of the Revenue Act of 1918 and under title IV, section 407, of the act of 1916 is imposed only on corporations and quasi-corporations having privileges by law. It is a privilege tax which is not imposed on bodies that have no special privileges.

**Massachusetts Statutory Law.**

The Circuit Court of Appeals, of its own initiative, refers to the statutes of Massachusetts imposing special duties upon trustees of trusts with transferable shares. Two things are noteworthy: one, that none of these statutes give any privileges, and the other that they were in existence before 1911 and governed the bodies held not to be subject to the tax in *Eliot* v. *Freeman*.

On May 24, 1909, Massachusetts enacted chapter 441 of the acts of that year, which provided that—

> "Section 1. Trustees of a voluntary association under a written instrument or declaration of trust the beneficial interest under which is divided into transferable certificates of participation or shares, shall file a copy of such written instrument or declaration of trust with the commissioner of corporations and with the clerk of every city or town in which such association has a usual place of business."

This act followed a policy to provide record evidence of the constituency of business organizations. In 1907, chapter 539, it had been provided that—

> "Section 1. Any person or persons conducting or transacting business in this Commonwealth under any name, designation or title other than the real name or names of the person or persons conducting or transacting such business, whether individually or as a firm or partnership, shall file in the office of the Clerk of the city or town in which the place or places of business or office or

offices of any such person, firm or partnership may be situated, a certificate stating the full name and residence of each person engaged in or transacting such business."

Section 2 of this act exempted certain bodies, including—

"Any firm, partnership, joint-stock company or association the business of which is conducted or transacted by trustees under a written instrument or declaration of trust, provided that the names of such trustees with a reference to such instrument or declaration of trust shall be filed as provided in Section 1."

The title of chapter 441 of the acts of 1909 was, "An Act Relative to Voluntary Associations Under Written Instruments." This act without significant change is now codified in General Laws of Massachusetts, chapter 182, sections 1 and 2, now in force. The Massachusetts act of 1916, chapter 184, provided that such a body may be sued in an action at law for debts and other obligations or liabilities, and also that its property should be subject to attachment in like manner as if it were a corporation. This is now General Laws, chapter 182, section 6. No rights or privileges were given.

**Excise Tax Act of 1909.**

This excise tax had its inception in 1909. President Taft, soon after his inauguration on March 4, 1909, sent Congress a message (44 Congressional Record, p. 3344) in the course of which he said:

"I therefore recommend an amendment to the

tariff bill imposing on all corporations and joint stock companies for profit an excise tax measured by 2% of the net income of such corporations. This is an excise tax upon the privilege of doing business as an artificial entity and of freedom from a general partnership liability enjoyed by those who own the stock."

On August 5, 1909, evidently in consequence of this message, an act was passed which provided that—

"Every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net

income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed." (36 U.S. St. at L., c. 6, sec. 38.)

On March 29, 1910, the Attorney-General gave an opinion that a partnership *having a limited liability by law* was a joint-stock company within this act (28 Opinions of the Atty. Gen. 189, 192; Treasury Decisions No. 1606, vol. 19, No. 13, p. 32).

On March 13, 1911, the act was construed in two decisions by this Court—*Flint* v. *Stone Tracy Co.*, 220 U.S. 107, and *Eliot* v. *Freeman*, 220 U.S. 178.

In *Eliot* v. *Freeman* all the trusts involved were subject to the Massachusetts statute law above quoted. Two of these trusts, the Cushing Real Estate Trust and the Department Store Trust, had features in common with the trusts now before the Court. The Department Store Trust had all the elements to make it a partnership (in distinction from a trust) which can be found in any of the trusts now before the Court.

*Flint* v. *Stone Tracy Co.* upheld the constitutionality of the tax, against an attack upon it as a tax upon income. The Court held that it was not an income tax, but that the tax, although measured by income as a reasonable method, was an excise tax. The Court said (145, 150 and 151):

"That is, when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described. As the latter organizations share many benefits of corporate organization it may be described generally as a tax upon the doing of business in a corporate capacity."

"A tax upon business done in a corporate capacity."

"The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, *i.e.*, with the advantages which arise from corporate or quasi-corporate organization."

"The requirement to pay such taxes involves the exercise of privileges." (192 U.S. 363.)

The same view was expressed again, much later, in *Stratton's Independence* v. *Howbert,* 231 U.S. 399, 416.

In *Eliot* v. *Freeman,* decided at the same time with *Flint* v. *Stone Tracy Co.,* the Court, in holding the trusts before the Court (*a fortiori* the trusts now before the Court) to be trusts and not subject to this excise tax, said (186):

"The language of the Act '. . . now or hereafter organized under the laws of the United States,' etc., imports an organization deriving power from statutory enactment."

"A trust of the character of those here involved can hardly be said to be organized, within the ordinary meaning of that term; it certainly is not organized under statutory laws as corporations are."

"There is an essential difference between a joint stock company as it exists at common law and a joint stock company having extensive statutory powers conferred upon it by the State within which it is organized. The latter kind of joint stock company is found in England and in the State of New York." (Cook on Corporations, sec. 505.)

In this opinion two grounds are assigned, either of which is sufficient to hold that these trustees are not subject to this excise tax, namely, one, that they are not created *under law*, and the other, that they are not *organized*. This interpretation, in *Eliot* v. *Freeman*, of the language used in the Excise Tax Act of 1909, in the light of which the subsequent acts have been framed, has never been modified and there has been no change in the language used by the Congress in the subsequent acts imposing this excise tax which indicates an intention to make so radical a change as to impose a privilege tax upon bodies that do not enjoy any privilege.

**Income Tax Act of 1913.**

The first income-tax act, of October 3, 1913 (38 Stats. c. 16, sec. 2), dropped the excise tax on corporations and imposed an income tax on individuals as well as on corporations. Section 2, paragraph G, imposing

on corporations the same tax as the normal tax imposed on individuals, defined corporations as follows:

> "Every corporation, joint stock company or association and every insurance company organized in the United States, *no matter how created or organized, but not including partnerships,* but if organized, authorized or existing under the laws of any foreign country, then upon the amount of net income accuring from business transacted and capital invested within the United States during such year." (Italics not in original.)

This was not an excise tax. No more was imposed on corporations than on individuals. The classification affected the method of levying the tax rather than the substance of the tax.

Under this act, on March 17, 1919, the Supreme Court held that a trust much like those at bar was not an association.

*Crocker* v. *Malley,* 249 U.S. 223.

On June 5, 1914, before this decision of the Supreme Court, a treasury regulation was issued. It provided that " 'corporations' as used in these regulations shall be construed to include all corporations, joint stock companies or associations and all insurance companies coming within the terms of the law and such organizations will hereinafter be referred to as 'corporations'." It also provided that, "it is immaterial how such corporations are created or organized," and the term, " 'joint stock companies or associations' shall include associations, real estate trusts, or by whatever name known, which carry on or do business in an

organized capacity, whether organized under and pursuant to state laws, trust agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the members or shareholders on the basis of the capital stock which each holds, or when there is no capital stock, on the basis of the proportionate share of capital which each has invested in the business and all of which joint stock companies or associations shall, in their organized capacity, be subject to the tax imposed by this act."

The subsequent decision in *Crocker* v. *Malley* disclosed that this definition was unauthorized. The trust involved in that case came within the language of this regulation.

On October 22, 1914, Congress imposed a tax on the transfer of shares in "corporations, associations and companies" without any further definition. The tax here imposed was not on existence as an association. It was on transfers of shares. The transfer was the privilege taxed. *Malley* v. *Bowditch,* 259 Fed. 809.

On July 21, 1915, the United States Express Company, which enjoys special privileges under the statutes of New York, was held to be an association or joint-stock company.

*Roberts* v. *Anderson,* 226 Fed. 7.

**Income and Excise Tax Act of 1916.**

On September 8, 1916, Congress enacted the Income Tax Act, following the act of 1913, and also re-enacted the Excise Tax, which had first come into existence in 1909 and had been abandoned in 1913. The excise

at this time was changed from one based on income to one based on the value of the capital stock. This act, in defining corporations for income-tax purposes, carried forward substantially the language of the act of 1913; and in defining corporations for excise-tax purposes, carried forward substantially the language of the act of 1909. This was an enactment of the interpretation which in *Eliot* v. *Freeman* the Supreme Court had put upon the language of the act of 1909.

Title I, section 10—the income-tax section—required the payment of the tax—

> "By every corporation, joint-stock company or association, or insurance company, organized in the United States, *no matter how created or organized* but not including partnerships, . . . by every corporation, joint-stock company or association, or insurance company organized, authorized, or existing under the laws of any foreign country." (Italics not in original.)

Title IV, section 407—the excise-tax section—provided that—

> "Every corporation, joint-stock company or association, [now or hereafter] *organized* [in the United States] for profit and having a capital stock represented by shares, and every insurance company, now or hereafter *organized under the laws of the United States, or any State or Territory of the United States,* shall pay annually a special excise tax with respect to carrying on or doing business by such corporation, joint-stock company or association, or insurance company,

equivalent to fifty cents for each one thousand dollars of the fair value of its capital stock and in estimating the value of capital stock the surplus and undivided profits shall be included. . . .

"Every corporation, joint-stock company or association, or insurance company, now or hereafter organized for profit *under the laws of any foreign country* and engaged in business in the United States shall pay . . ." (Italics and brackets not in original.)

It will be observed that the only change in this language from that of the act of 1909 was in adding, after the word "association," the words "now or hereafter," and by adding, after the word "organized," the words "in the United States," and that there is no change in the comma after insurance company. If the words in the brackets are omitted, the description in this act is the same as that in the act of 1909. The reason for the addition of these words is apparent on observing the form in which the tax was imposed on the domestic corporation and on the foreign corporation in the two sections, respectively. In the act of 1909 the corporate and quasi-corporate bodies were defined, once for all, at the beginning of the section—whether they were domestic or foreign. The subsequent parts of the section fixed the amount of the tax in accordance with the place of organization—whether domestic or foreign—but did not repeat the words "corporation, joint-stock company, association or insurance company." In the act of 1916 foreign and domestic corporations, respectively, were thrown into separate paragraphs of the section, and the

words "corporation, joint-stock company, association or insurance company" are repeated in the second paragraph. This accounts for the inclusion of the words "in the United States" in the first paragraph. The words "*organized under the laws of the United States or of any State or Territory of the United States,*" which were the words on which the decision in *Eliot* v. *Freeman* was based, appear in the act of 1916, preceded by the *same comma* to separate them from insurance company, and in exactly the *same place* in which they appeared in the act of 1909. The Court had held in *Eliot* v. *Freeman* that these words applied not merely to insurance companies, but also to corporations, joint-stock companies and associations. When re-enacted in 1916, in the same position, these had the same application. They qualified associations. It is respectfully submitted that if this section stood alone, it would be clear that it was a re-enactment of the act of 1909 as interpreted in *Eliot* v. *Freeman;* but the section does not stand alone, and the rest of the act makes the conclusion even clearer, because Congress, in section 10, when not imposing a privilege tax, but merely defining the method of application of a general income tax, used the words "*no matter how created or organized,*" and left out the words "*organized under the laws of the United States or any State or Territory of the United States.*" The words "no matter how created or organized" were probably adopted because of the decision in *Eliot* v. *Freeman* and with the intention of imposing the *income* tax on associations as a group instead of levying it on the individual members of the association. This was a convenient method, and did not increase or diminish the

tax. It was not a privilege tax. The Congress which used these words and omitted the words "organized under the laws of the United States or any State or Territory of the United States" in the income-tax section and reversed the process in the excise-tax section must have meant something. What was meant was not to impose a privilege tax on bodies that enjoy no privilege.

This marked distinction between the income-tax section and the excise section is emphasized by the course of the act through Congress. The bill as read in the House provided for an income tax, but for no corporate excise tax (Congressional Record, 64th Congress, 1st Session, vol. 53, p. 10663). In reporting the bill with amendments to the Senate, the chairman, Senator Simmons, said: "We have also provided for imposing a small tax upon corporations in the nature of a license tax for doing business." (Senate Reports, 64th Congress, 1st Session, vol. 3, Miscl. 3, Rep. 793, p. 2.) The section so reported was as follows:

> "Section 56. That on and after January first, nineteen hundred and seventeen, special taxes shall be and hereby are, imposed annually as follows, that is to say:
>
> "First. Corporations, joint stock companies, and associations shall pay 50 cents for each $1000 of capital, surplus, and undivided profits used in any of the activities or functions of their business, including such sums as may be invested in or loaned upon stock, bonds, mortgages, real estate, or other securities. The amount of such annual tax shall in all cases be computed on the basis of the

capital, surplus, and undivided profits for the preceding fiscal year. Every corporation, joint stock company, or association as defined and limited in Section ten, Title 1 of this Act, shall be liable to this tax: . . ."

Title I, section 10, so referred to, imposed the income tax and had in it the words "*no matter how created or organized.*" Apparently the House was unwilling to make this extension of this excise tax so as to cover bodies that had no special privilege. The Conference report is "Agreed to Senate amendment #206 and in lieu of matter inserted by said amendment, insert the following." Then follows the title IV, section 407, as finally enacted, leaving in the words "*organized under the laws of the United States or any State or Territory of the United States*" and leaving out the words "*no matter how created or organized.*" With the distinction clearly brought to its attention, Congress decided not to impose a privilege tax upon bodies that enjoyed no privileges.

Treasury Regulations No. 33 under the act of 1916 again made an attempt to cover such trusts as those at bar. There had been no change in the law from that of 1909 which would warrant such a regulation. The invalidity of the regulation was subsequently shown by the decision in *Crocker* v. *Malley,* 249 U.S. 243.

**Income and War-Profits Tax Act of 1917.**

The act of March 3, 1917, made no change of importance in the present connection, from that of 1916.

The act of October 3, 1917, imposed the war-profits tax, amended the act of 1916 as to the amount of in-

come tax, and brought forward the stamp tax. This act did nothing to the excise-tax law. That law remained as it was under the act of 1916. The act of 1917 introduced a definition section (200). This section is in Title II, "War Excess Profits Tax." It provides that:

> "Section 200. That when used in this title—
>
> "The term 'corporation' includes joint-stock companies or associations and insurance companies;
>
> "The term 'domestic' means created under the law of the United States, or of any State, Territory or District thereof, and the term 'foreign' means created under the law of any other possession of the United States or of any foreign country or government."

It is evident that this section contemplates nothing as a corporation, joint-stock company, association or insurance company unless it is either domestic or foreign. To be either of these it must be *created under the laws of*. Accordingly, this act does not include in this classification a body formed by voluntary indenture of trust without any privileges granted by law. It will be noted that the word "created" is here used as including "organized." The word "organized" plays no part in the definition.

### Revenue Act of 1918.

The Revenue Act of 1918, enacted February 24, 1919, covered war profit, excess profit, income, excise, and many other taxes. This act has a definition section for

all purposes of the act. The definition is apparently derived from the act of 1917. It provides that:

> "Section 1. That when used in this act . . .
>
> "The term 'person' includes partnerships and corporations, as well as individuals;
>
> "The term 'corporation' includes associations, joint-stock companies, and insurance companies;
>
> "The term 'domestic' when applied to a corporation or partnership means created or organized in the United States; the term 'foreign' when applied to a corporation or partnership means created or organized outside the United States."

Some change in phraseology from the act of 1917 was necessary, even if no change in meaning was intended, because the definition section covered partnerships as well as corporations. It would not have been appropriate, in defining "domestic" and "foreign" partnerships, to speak of them as "organized under the laws of." Therefore, the word "in" is used as a word which is applicable both to partnerships and to corporations. The idea that a corporation could be organized except "under the laws of" is inconceivable. A general definition section without more would not be enough to make a radical change in the character of a tax imposed by a particular section of an act, couched in language not itself significant of any intention to change the nature of the tax.

This act, in imposing the excise tax, shows clearly an intention to apply it to the same class of bodies as

had been described in the excise section of the act of 1916, above quoted. It provides that:

> "Section 1000 (a). That on and after July 1, 1918 *in lieu of the tax imposed by the first subdivision of section 407 of the Revenue Act of 1916*—
>
> "(1) Every 'domestic' corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to one dollar for each one thousand dollars of so much of the fair average value of its capital stock for the preceding year ending June 30th as is in excess of five thousand dollars. In estimating the value of capital stock the surplus and undivided profits shall be included;
>
> "(2) Every 'foreign' corporation shall pay annually . . . of the average amount of capital employed in the transaction of its business in the United States . . ." (Italics not in original.)

There is no change in phraseology sufficient to indicate an intention to impose a privilege tax on a body that did not enjoy a privilege and which would not be taxed under the earlier acts. Nine years before this, the tax had come into existence as a privilege tax after the President's recommendation to impose a tax upon "the privilege of doing business as an artificial entity and of freedom from a general partnership liability enjoyed by those who own the stock." The law had been interpreted by this Court in *Eliot* v. *Freeman* as imposing the tax only as a privilege tax. That definition had been known for seven years. If the Congress had any intention to change the nature of the

tax, it was easy to express it. There has been no such expression.

That there was no intention to enlarge or to make any change from the 1916 law in that respect is confirmed by the statement of Mr. Kitchin, the House chairman, in laying the Committee's report before the House. He said: "We have made a very important change in the rates and in the exemptions of what is known as the corporation capital stock tax that has been on the statute books for two years. The tax is now 50 cents on each thousand dollars of so much of the fair average value of its capital stock for the preceding year as is in excess of 99,000. The fair average value is the language of existing law and is carried in this bill. We make the tax $1.00 on each $1,000 of the 'fair average value' of the stock in excess of $5,000" (Congressional Record, vol. 56, part 12, 65th Congress, 2d Session, Appendix, p. 698). Senator Simmons, the Senate chairman, in his report (65th Congress, 3d Session, 1918-1919, Senate Reports, vol. 1, No. 617, p. 17) said: "The House Bill provided for the continuance of the capital stock tax on the basis of the fair average value of the capital stock of the corporation for the preceding year. The determination of fair average value has proved in administration to be very difficult. The committee has accordingly provided that the basis of the tax shall be the amount of the net assets of the corporation as shown by its books, etc." The use of the word "continuance" does not indicate an intention to tax different bodies from those taxed under the earlier act. If there had been any intention to make a change in the class of bodies to be taxed, it would have been mentioned.

As the act of 1918 consolidated so many different tax acts which had received prior judicial construction, the principle announced by this Court becomes applicable, that—

> "Even where inadvertent changes have been made by incorporating different statutes together, it has been held not to change their original construction. Thus, in New Jersey, where several English statutes had been consolidated, a proviso in one of them, broad enough in its terms to affect the whole consolidated law, was held to affect only those sections with which it had been originally connected. . . ."

> "So, upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law."

*McDonald* v. *Hovey*, 110 U.S. 619, 628, 629.

> "It is not to be inferred that Congress, in revising and consolidating the statutes, intended to change their effect, unless an intention to do so is clearly expressed."

*Logan* v. *United States*, 144 U.S. 263, 302.

> "At the time of the revision in 1873, Section 22 was divided into several shorter sections and included in the revision according to an arrangement, adopted for purposes of convenience only, whereby the several parts of the original section became more or less separated; but that, in the

absence of some substantial change in phraseology, did not work any change in their purpose or meaning."

*Buck Stove Co.* v. *Vickers,* 226 U.S. 205, 213.

It is a general principle of statutory construction that a re-enactment or an enactment of language which has received an authoritative interpretation by the Supreme Court is virtually an enactment of that interpretation, and also that a change is not to be inferred in the absence of clear language requiring it.

*The "Abbotsford,"* 98 U.S. 440.
*Latimer* v. *United States,* 223 U.S. 501.
*United States* v. *Sixty-Five Terra-Cotta Vases, etc.,* 18 Fed. 508 (C.C. S.D. N.Y.).
*United States* v. *Trans-Missouri Freight Association et al.,* 58 Fed. 58 (C.C.A. 8th).
*In re Guggenheim Smelting Co.,* 121 Fed. 153 (C.C. D. N.J.).
*Schmidt* v. *United States,* 133 Fed. 257 (C.C.A. 9th).

Also, it is well settled that an ambiguity in a tax statute is to be resolved in favor of the taxpayer rather than in favor of the Government.

*Gould* v. *Gould,* 245 U.S. 151.
*United States* v. *Isham,* 34 U.S. 496, 504.
*Hartranft* v. *Wiegmann,* 121 U.S. 609.
*Amer. Net and Twine Co.* v. *Worthington,* 141 U.S. 468.
*Eidman* v. *Martinez,* 184 U.S. 578, 583.
*Swan and Finch Co.* v. *United States,* 190 U.S. 143.

*Benziger* v. *United States,* 192 U.S. 38.
*Parkview Bldg. and Loan Assn.* v. *Herold,* 203 Fed. 876 (D.C. D. N.Y.), affirmed 210 Fed. 577 (C.C.A. 3d).
*Haiku Sugar Co.* v. *Johnstone,* 249 Fed. 103 (C.C.A. 9th).
*United States* v. *Coulby,* 251 Fed. 982 (D.C. N.D. Ohio, E.D.), affirmed 258 Fed. 27 (C.C.A. 6th).
*Scott* v. *Western Pacific Ry. Co.,* 246 Fed. 545 (C.C.A. 9th).
*Spreckels Sugar Ref. Co.* v. *McClain,* 192 U.S. 397.
*United States* v. *Wigglesworth,* 2 Story, 369, 28 Fed. Cas. No. 16,690.

Also, it is a general principle of tax interpretation that where, in any tax act, there are general and specific descriptions which in any manner conflict, the tax will be levied under the more exact description.

*Arthur* v. *Zimmerman,* 96 U.S. 124.
*Movius* v. *Arthur,* 95 U.S. 144.
*Arthur* v. *Lahey,* 96 U.S. 112, at 116.
*Amer. Net and Twine Co.* v. *Worthington,* 141 U.S. 468.

The act of 1918 recognizes, for purposes of taxation, at least four different taxable bodies, namely, the individual, the partnership, the corporation (including quasi-corporations) and the trust. "Association" is a loose, general term which has no such well-defined meaning as "corporation," "joint stock company," "partnership" or "trust" (*Smith* v. *Anderson* (Ct.

of App.), 15 Ch. Div. 273). It gets its definition from its context and may well have a different meaning in different parts of the same act as called for by the context. For instance, a gift to an association that has no special privileges may be a proper deduction as a charitable gift. Notwithstanding this, the association may not be subject to an excise tax.

Of the four classes recognized by the act of 1918 these trustees naturally fall into the class of trusts and not that of corporations. The usual characteristics of a trust exist. They are launched by an indenture of trust. The legal title is in the trustees. They administer the trust. This is true, even if they are so far subject to the control of the beneficiaries that the beneficiaries are to be held to have the liabilities of partners. That liability is not inconsistent with the existence of a trust to hold title to the property which yields the income. The fact that a trust may be amended, or even terminated, does not make it any the less a trust (*Kelley* v. *Snow,* 185 Mass. 288; *Mackernan* v. *Fox,* 220 Mass. 197). In the case of the income tax, the levy should be made upon the beneficiaries as beneficiaries of a trust and not upon the trustees as a corporation. *Crocker* v. *Malley,* 249 U.S. 223, so decides. The Court there distinguishes clearly between an "association" and a "trust," saying:

> "On the other hand, the trustees by themselves cannot be a joint-stock association within the meaning of the act unless all trustees with discretionary powers are such, and the special provision for trustees in D. is to be made meaningless. We perceive no ground for grouping the two

—beneficiaries and trustees—together, in order to turn them into an 'association,' by uniting their contrasted functions and powers, although they are in no proper sense associated. It seems to be an unnatural perversion of a well-known institution of the law."

It appears to be conceded that even if trustees issue transferable shares, they are not liable to this excise tax unless the control of the affairs of the trust is vested in the beneficiaries so that the trustees are not really trustees, but merely agents for the beneficiaries. The contention for the Government then produces this extraordinary result—that the beneficiaries of a trust with transferable shares who do not control its affairs, and who are not liable as partners for its debts, are not subject to the excise tax; but if the beneficiaries do control the affairs of the trust, so that they are liable as partners for the debts, they are liable to this excise tax; notwithstanding the fact that this tax came into existence as a tax upon "the privilege of doing business as an artificial entity and of freedom from a general partnership liability." It would take very clear language to indicate that Congress intended such a subverted result.

In the cases at bar it would be an abnormal use of language to call Louis Hecht and Simon Hecht, or Howard and Barlow, an "association." They are naturally described as "trustees." They enjoy no special privileges. The trustees manage the real estate in the way that typical trustees under a will would manage it. They are liable as contractors would be at common law. They may bargain for exemption from

liability, but if they obtain it, they obtain it by a voluntary agreement of those who contract with them. The transferability of the shares is not an unnatural feature of a trust. If there is no effective spendthrift provision, and the shares in a trust have vested in the beneficiaries, they are usually transferable. This quality is not made or changed by the fact that the trustees issue certificates that show from time to time who are the beneficiaries.

The more reasonable construction of the declarations of trust indicates that the beneficiaries are not even partners. It is immaterial whether they are. They are beneficiaries of a trust. The trustees as trustees hold the title, manage the investment, incur any liability that is incurred, by trustees' contracts with outsiders. In the ordinary use of the term (1) they are not an association, (2) they are not organized, (3) they are not created under any law, and (4) they exercise no special privileges. There has been no change in the law indicating an intention to impose this privilege tax on a body that does not have any special privileges. The decision in *Eliot* v. *Freeman* is applicable.

Respectfully submitted,
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July, 1922.